IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-319, No. 78-320

HERTZ COMMERCIAL LEASING CORPORATION,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

AVIS RENT A CAR SYSTEM, INC. and CHRYSLER LEASING CORPORATION,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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REASONS FOR DENYING THE WRIT

I.

VICARIOUS LIABILITY OF THE KIND PERMITTED BY THE ILLINOIS SUPREME COURT'S INTERPRETATION OF THE ORDINANCE HAS BEEN HELD CONSTITUTIONAL IN A CONSISTENT LINE OF SUPREME COURT OPINIONS.

The Illinois Supreme Court interpreted the Chicago parking responsibility ordinance* here at issue as creating vicarious liability. Under the ordinance as interpreted, the owner is legally responsible for parking violations committed with his automobile, even if another person was operating the vehicle at the time. Below, petitioners challenged that interpretation of the ordinance, but in this court they claim that as interpreted, the ordinance violates due process, at least as far as car rental companies are concerned.

But the validity of laws establishing vicarious liability of a property owner for illegal acts committed with his property by another is recognized beyond question. "It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it.

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* Municipal Code of Chicago, Illinois, ch. 27, sec. 27-364:
"Whenever any vehicle shall have been parked in violation of any of the provisions of any ordinance prohibiting or restricting parking, the person in whose name such vehicle is registered shall be prima facie responsible for such violation and subject to the penalty therefore."
The text of the ordinance is incorrectly quoted in the briefs of both petitioners with the addition of the word "presumptions," a word which does not appear in the text of the ordinance. Avis Pet. 2, 3; Hertz Pet. 3, 4.

. . . [C]ertain uses of property may be regarded as so undesirable that the owner surrenders control at his peril." *Van Oster* v. *Kansas,* 272 U.S. 465, 467 (1926). In *Van Oster,* the owner's automobile was used with her permission but without her knowledge or authority for transporting illegal liquor. The Supreme Court upheld against a challenge on Fourteenth Amendment due process grounds the Kansas statute by which the innocent owner was required to forfeit the vehicle because of its use for an illegal purpose.

The *Van Oster* court noted that a vicarious liability statute is a "device consonant with recognized principles." 272 U.S. at 468. Similarly, this court has frequently approved a variety of other statutes making one person liable for unauthorized and illegal acts of others, even when the penalty has been a criminal conviction with the possibility of a jail sentence. Two such examples are *United States* v. *Dotterweich,* 320 U.S. 277 (1943), and, recently, *United States* v. *Park,* 421 U.S. 658 (1975). In both cases this court upheld the convictions of corporate presidents for their companies' failure to observe the sanitation requirements of the Food, Drug and Cosmetic Act, despite evidence that the executives did not authorize, and in fact had no knowledge of, the conditions resulting in the charge. In contrast to the local court schedule of fines of $3-$20 in the present case, the potential liability in *Park* and *Dotterweich* was imprisonment of up to one year and a $1000 fine.

Similarly this court upheld a New York statute that created civil liability for an owner of an automobile involved in an accident, even if the car was driven by another and the owner not present, if the owner had given the driver permission to use the automobile. *Young* v. *Macsi,* 289 U.S. 253 (1933).

The petitioners here are owners who happen to be in the business of leasing automobiles to others. Leasing does not insulate them from liability when an automobile is used illegally. A lease arrangement did not prevent the forfeiture of an owner's yacht in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 633 (1974). There, the yacht was operated by lessees pursuant to a lease, but the lessees used it without authorization and without the lessor's knowledge to import marijuana. The Supreme Court held that the yacht could be declared forfeit under a statute which subjected to forfeiture any vessel used to transport illegal drugs. In upholding the statute's validity, this court stated it agreed with the proposition that

> "... a long line of prior decisions of the Court establish the principle that statutory forfeiture schemes are not rendered unconstitutional because of their applicability to property interests of innocents." 416 U.S. 680. "The innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." 416 U.S. 683.

The present case does not merit the court's review because the Illinois Supreme Court recognized and followed these acknowledged principles and because the principles are so well established. The Illinois Supreme Court referred to the Supreme Court's opinions cited above and properly recognized the petitioners were no different than those other innocent owners upon whom the hardships of vicarious liability fall to accomplish a public purpose. 375 N.E.2d 1290-91, 71 Ill.2d 345-7; Avis Pet. Apx. A9-A10; Hertz Pet. Apx. 9a-10a. The Illinois Supreme Court, in finding the ordinance valid, did not depart from this court's decisions on this subject. Similarly no purpose would be served by reexamining at this late date the concept of vicarious liability which has roots in the ancient common

law concept of deodand and which has been reaffirmed in 1974 in *Calero-Toledo* with the dissent of but one currently sitting justice.

Nor do the variety of state parking liability statutes and the diversity of state court interpretations of them require this court's attention.* The states under our federal system are permitted to find solutions to problems such as parking in ways seeming most appropriate according to each state's own lights. This is permitted as long as constitutional rights are not infringed, and as this court has frequently held, the imposition of vicarious liability—Chicago's solution—is not contrary to the constitution.

II.

THE ORDINANCE'S IMPOSITION OF LIABILITY UPON OWNERS RATHER THAN OPERATORS MEETS THE REQUIREMENTS FOR DUE PROCESS ARTICULATED BY THE SUPREME COURT.

Although there is "no closed definition, for the law on the subject is neither settled nor static," *Morissette* v. *United States*, 342 U.S. 246, 260 (1952), three elements are necessary if vicariously punishing one for the acts of another is to be consistent with due process. The Illinois Supreme Court's judgment properly affirms the presence in this case of the three elements: A. The offense punished is one against the public welfare; B. The penalty is small; and C. The defendant stands in a "responsible relation" to the public danger.

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* Some of these cases are cited at Avis Pet. 5 n.4 and in the opinion of the Illinois Supreme Court. 375 N.E.2d 1289-90; 71 Ill.2d 342-5; Hertz Pet. Apx. A6-A8; Avis Pet. Apx. 6a-8a.

A. Parking Violations Offend The Public Welfare; Enforcement Is Impracticable Without Vicarious Liability.

The number of parking violations committed daily, the inconvenience and danger they create and the real difficulty in enforcing parking laws supply the classic description of a public welfare offense. Mr. Justice Frankfurter defined the offenses for which vicarious liability is permissible:

> "The purposes of this legislation thus touch phases of the lives and health of people, which, in the circumstances of modern industrialism, are largely beyond self-protection. . . . The prosecution . . . is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger." *United States* v. *Dotterweich*, 320 U.S. at 280-1.

The application of such policy considerations to the parking problem in Chicago makes clear the necessity of the ordinance making owners liable for parking offenses. Parking violations are a major problem, both upon the streets and in the courts. By far the largest number of court cases filed in Cook County, Illinois (the judicial jurisdiction for Chicago) are parking violations. In 1966, the year the instant case was filed, more than 1,100,000 complaints alleging traffic violations were filed in the Circuit Court of Cook County. 1966 Report of the Administrative Office of the Illinois Courts. (Some 13,000 of these, more than 1% of the total, were violations alleged to have been committed with automobiles owned by the three petitioners in the instant case.) Of course, more than a million traffic citations represents an equal number of violations resulting in incalculable problems. These range from such minor offenses as overstaying a parking meter to parking a vehicle in such a way as to block access to pedestrian crosswalks, fire hydrants, fire escapes and emergency exits.

It is impossible for municipal authorities to, in the first instance, identify the actual driver of the car who parked the vehicle in violation of the law. The city's only practical recourse is to issue notices of violation to the person in whose name the automobile is registered. If the owner may not be held vicariously liable, the prosecution would be required to be commenced against the operator. But, to require cities to proceed against the actual operator interposes a second layer, making prosecution in most cases difficult or impossible. Often, the *owner* fails to respond to violation notices even when he is thought to be primarily liable. There is nothing which supports the belief that an owner will be forthcoming with information implicating another person in the commission of an ordinance violation.

Even when the owner furnishes the name of the alleged driver it presents more practical difficulties and results in substantial delay. First, the city must contact the registered owner; second, the city must await the owner's answer as to who was the actual driver at the time of the violation; third, the city must obtain jurisdiction over the person the owner says was the driver at the time of the violation (an insurmountable problem for out-of-city and out-of-state drivers); fourth, the city must await the purported driver's response; fifth, not only must the city prove the violation in fact occurred (a fact to which the complaining police officer must testify no matter who is the defendant), but must also prove that the accused driv-

er was actually the person driving the automobile at the time it was parked in violation of the law. The latter is virtually impossible to prove since the complaining officer did not see the car being driven, but only observed the car in a stationary position parked in violation of the law. Finally even if judgment is obtained by default or otherwise against an out-of-city or out-of-state driver, collection of the fine may be uneconomical because of the small sum involved.

As a practical matter, then, if a city could only prosecute the actual operator of the vehicle, there would be virtually no convictions for parking violations among the one million violations observed each year. The only practical solution is the liability of the registered owner.

Thus, enforcement of the parking laws is seriously hampered without vicarious liability, and it is just such a minor offense which is contemplated in the term "public welfare offense."

B. The Penalty Is Small.

In describing the kinds of offenses in which strict liability is imposed, this court has stated that the "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette,* 342 U.S. at 256.

Thus, one factor permitting the imposition of liability based on ownership, alone, of illegally used property is the probability that no exorbitant penalty is extracted. This is particularly true of parking tickets.

Petitioners, however, add together all parking tickets incurred with vehicles owned by them in the last twelve years and complain of the two million dollar fine they may suffer. But this overlooks the small fine imposed for any single offense. As petitioners themselves point out, local court rule sets the usual fine at $3 to $20, depending on the violation. Hertz Pet. 11 n.14. City ordinance limits the penalty for any ticket to a $200 fine.* The validity of an ordinance should not turn on the number of separate violations a single offender may accumulate.

But no aggregation of fines and no *de hors* record references to newspaper scofflaw and pretrial detention stories can transform a Chicago parking ticket conviction into a jail sentence. Jail is only a possibility for those who contemptuously fail to pay fines. The standard bail for parking violations has been set by court rule at $35.** Jail (and such is the case only if bond cannot be met) is not a practical possibility except for the hardest-core scofflaws.

The true perspective of this parking ticket case is to be found in comparing a $20 fine with the possible year imprisonment in *Park* and *Dotterweich* and the forfeiture on a $19,800 yacht in *Calero-Toledo.*

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* Municipal Code of Chicago, Illinois, ch. 27, sec. 27-363:
"Every person convicted of a violation of any of the provisions of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than two hundred dollars for each offense."

** Rule 528(a) of the Rules of the Illinois Supreme Court (Ill. Rev. Stat. 1977, ch. 110A, par. 528(a)): "Bail for offenses . . ., including ordinance violations, punishable only by a fine which does not exceed $500 shall be $35 cash."

C. Owners, Including Rental Companies, Stand In A "Responsible Relation" To The Offense And Offender.

In vicarious liability offenses based on ownership of property, the law presumes the owner has at least some control over use of the property. It has been expressed in several ways. Mr. Justice Frankfurter called it a "responsible relation to a public danger." *Dotterweich,* 320 U.S. at 281. It also has been stated that the defendant must be in a "position to prevent the violation," *Park,* 421 U.S. at 671, "with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." *Morissette,* 342 U.S. at 256. The penalty should "serve as effective means of regulation." *Dotterweich,* 320 U.S. at 281.

But the burden is on the owner to prove he does not stand in such a "responsible relation" and that he cannot exert any control. This court stated that a constitutional defense is available to *"an owner who proved . . .* that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Calero-Tolero,* 416 U.S. at 689, emphasis added. In that case the defense was not available because the owner

> "voluntarily entrusted the lessees with possession of the yacht, and *no allegation has been made or proof offered* that the company did all that it reasonably could to avoid having its property put to an unlawful use." *Ibid.* at 690, emphasis added.

Petitioners never made the allegation or offered any proof at trial that they had done all that was possible to control, prevent or reduce their customers' parking violations. The hyperbole and repetition of petitioners' briefs are no substitute for proof. And whatever arguments about rent-

a-car operations and practices are contained in the petitions are untested at trial. Petitioners presented argument, but no evidence below.

Some of petitioners' arguments do not withstand the slightest scrutiny, in any case. The Avis petition (at 9) claims that no petitioner "knows the person to whom the vehicle is rented." Therefore, it is argued, the companies are in no position to prevent parking violations, to compel assistance in a defense or to seek reimbursement.

Only the naive would believe a rent-a-car company would turn over a $5000 automobile to a person it did not know. Rather, cars are leased only to those who can furnish identification, a license and evidence of financial responsibility, such as a cash deposit or credit card. With this established, there are many conceivable ways lessors can control parking violations. They can decline to rent again to those who have previously violated parking laws with the lessor's vehicles. It is conceivable the rental industry could pool names of frequent violators in the same way the insurance industry keeps track of claimants.

Further, the rental contract, if it does not already, could contain the lessee's agreement to observe parking laws and to appear and defend tickets and could provide for penalties if the agreement is broken. Those penalties could include reimbursement of any fine the lessor pays.

It is not farfetched to believe that rental companies could easily enforce the financial provisions of such agreements. Leasing companies often have extended business arrangements, or billing arrangements or long-term leases with customers, sending bills or credit card invoices long after the rental is completed. And, of course, where there

is no credit relationship, the company can assure payment by having the customer give a deposit or bond.

Petitioners made no effort to show these steps are impossible or extraordinarily costly. Not having done so, they are in no position to say that the judgment below violates due process by making them liable for violations over which they have no control—a proposition that they argue with vigor but have not established.

CONCLUSION

For these reasons the petition for certiorari to the Illinois Supreme Court should be denied.

Respectfully submitted,

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September 25, 1978